THEORETICAL PROBLEMS OF CODIFICATION IN THE HUNGARIAN CONFLICT LAW

by

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Up to the present Hungary has not had an Act on International Private law- a Code of Conflict Law. The slow development and progress of the Hungarian International Private Law could not follow those of West Europe. The draft of a Private Law Code of 1900 contained a part regulating Conflict Law similar to the German EG (Einführugsgesetz), but this draft was never submitted to legislation.

Two other drafts were made by Professor Istvan Szászy in 1937 and 1947. A new codification was initiated by the Institute of Political and Legal Sciences (Hungarian Academy of Sciences) in 1966 and a new draft was drawn up. Simultaneously Professor Miklós Világhy and Professor László Asztalos made a private draft taking into consideration all criticisms on the former draft. This private draft became the basis of the codification accomplished in 1970 under auspices of the Ministry of Justice. This study is going to present an approach to some theoretical problems of the recent codification.

1. Need for, and practicability of the codification of private international law.

Codification of private international law,[1] the need for this codification, and its practical accomplishment are problems frequently discussed in modern literature of jurisprudence.[2] Arguments and counterarguments, wishes and requirements manifest themselves among those accepting private international law in its narrower sense, i. e. as the law of conflicts, in like way as among those who deal with this material of law in its wider sense, i. e. in its bearing on direct and indirect (conflicts) regulation.

a) As for codification in both bourgeois and socialist literature actually two tendencies prevail. The one deals with codification in general,[3] and within this scope it may show a certain concern with private international law. The other tendency analyses the codification of private international law, and in the course of this analysis is apt to contemplate the problem by itself, in a somewhat sterile manner, detached from the regulation of domestic law.[4]

From the point of view of socialist law in general codification is of critical importance. As regards socialist codification attitudes of significance have been taken to the problem, and even in Hungarian literature, notwithstanding a certain backlog in codification work compared to the other people's democracies,[5] the need for, and the practical aspects of codification have been accorded a position of some prominence. As a matter of course, and also in view of the way the question is approached, here we have to do in the first place with the need for, and the potentialities of, the regulation of substantive law, whereas for the present purpose apparently peripheral codification of private international law will be touched upon incidentally only.

Positions taken by scholars of private international law in connexion with codification work, and so also in Hungarian literature in the first place the utterances of Szászy, Világhy, Réczei and Mádl[6] setting out from private international law, primarily concern and justify the need for codification. However, need for, and potentiality of, the codification of private international law exactly because of the foreign element implied in this codification, present two peculiariaties. First, the socialist principles followed at the formulation of the rules of domestic substantive law will manifest themselves in another form in private international law. Secondly, the codification of private international law is of necessity and also historically lagging behind the regulations of domestic substantive law whose relations implying a foreign element are brought under regulation by private international law.

As for this latter question we can but welcome the systematization by Professor Szászy[7] which draws a comparison between the treaty-favouring universalist-internationalist theory, the particularist-nationalist tendency approving a codification by domestic law and the pragmatic-empiric tendency opposing both methods, and fundamentally rejecting codification altogether on the one side, and the actually established and realized codification, or such as bogged down simply in the experimental or project phase during one and a half centuries in the European development, on the other. However, the particular tendencies expressed aspirations only, and failed to display the real potentialities associated with a codification suiting the economic-social demands and needs, i. e. potentialities which in the given international situation and in the relations of the given country prevailed in the problem of codification.

The discipline of private international law as a discipline proper, here too is to some extent lagging behind actual needs. At the same time, as has been emphasized also by Hungarian literature of private international law,[8] for the purpose of a scope of law the significance of science will always be greater when the particular scope has not yet been codified.[9]

When now the formulation of the rules governing private international law are surveyed on a statutory level, then it is beyond doubt that the nationalistic tendency following in the wake of the period of bourgeois revolutions was in the first place intent upon codifying certain problems, which at a later stage proved to be such private international law, in

association with domestic substantive law at that time gradually brought under regulation (e.g. the Code civil). (Naturally such partial codification preceding the bourgeois revolution made its appearance already in certain sections of the German Civil Code (Allgemeines bürgerliches Gesetzbuch – ABGB), moreover in the Allgemeines Landrecht – (ALR). Regulation by international conventions which came to life in the second half of the 19th, and the opening years of the 20th centuries (e.g. in copyright law, or the Hague conventions) does not contradict the statement that codification is fundamentally a problem of domestic substantive law superservient to the codification of private law (e.g. the German Civil Code (BGB) and the Einführungsgesetz EG), which have come to be completed with the provisions of international conventions called forth by the gradual intensification of international relations[10]. In our opinion in reality in the liberal capitalistic phase of capitalist evolution, if the need for a regulation of these questions was recognized at all, in the first place they were brought under regulation in conjunction with the conflict rules associated with domestic substantive law. At the dawn of monopoly capitalism legal regulation was more and more vigorously completed by regulation by international conventions.

However, regulation by international conventions also presents a peculiar picture. Does this regulation extend to the whole scope of what at that time was regarded as such of private international law? The question has to be answered in the negative. Regulation by international conventions in the first place dealt with personal rights, and within them family law (e.g. the Hague conventions), secondarily with the scope of intellectual property brought under a regulation of basically territorial effect, where the legal protection of publishers, or patentees (and their assignees) justified regulation by international conventions. (To these we have as a matter of course to add international conventions associated with commercial activities, such as those governing trademarks or collision of vessels at sea.) However, no regulation came into life, moreover no attempts were even made, in spheres of international economic relations or international trade, where merchants displaying activities in such relations, or the monopolies *in statu nascendi* could satisfy their needs partly by the rules of domestic substantive law, partly by contractual stipulations, without having recourse to a codification of conflict rules.

However, the situation changed in the phase of monopoly capitalism, in the first place in the years following upon the First World War. The gathering vigour of internal nationalistic ideology did not favour international conventions, yet even so a number of conventions were concluded (so e.g. the Geneva convention on bills and cheques, the convention on arbitration), and recent civil codes, in line with this ideology, also contain provisions governing private international law (so e.g. the Greek civil code, the Italian Codice civile). However, whereas the liberal capitalistic phase itself, in particular its period consistently attaching to the bourgeois revolution, emphasized the need for codification, as the codification

governing the totality of a branch of law, the phase of monopoly capitalism, with its strained economic and social relations was in general hostile to codification[11]. (This hostility manifested itself, of course, with the peculiarities of the given country.) At the same time, in the phase of monopoly capitalism the first legislation relating to problems of private international law was promulgated which did not bring under regulation questions of conflict law as a by-product of the codification of substantive law, but in the form of a self-contained code. Naturally the reasons prompting codification in the given country may differ essentially from those in another. So e.g. the Polish legislation of private inter-territorial and international law of 1926, set out from the given, only too justified private interterritorial law of Poland then regained her independence, and this legislation was then completed by provisions of private international law. At the same time the Czechoslovak and Rumanian drafts too set out from the need for a regulation of the situation presenting itself after the achievement of political independence.

The Código Bustamente of 1928 departs from these legislations. This code had as its objective the regulation of the in many respects common traditions and interests of the peoples of Latin America and of the relations of these countries, its nationals and merchants among themselves and to third states on the international plane. The conventions signed by the Scandinavian states in the beginning of the thirties were in like way of a regional character. Before the Second World War the Soviet Union was the only socialist country taking part in world trade and – in European – private international law. Although capitalist efforts to isolate the Soviet Union in the political, economic spheres and so to say in all conditions of life, relaxed somewhat in the thirties, so that the role of the Soviet Union in international life expanded considerably, to an extent that she could join certain international conventions, in her internal relations and domestic law the need for a regulation of private international law as a whole was not yet mature or pressing. This need, and in the temporal order the situation following upon the Second World War threw open the path to the Soviet Union to join a number of international conventions, and brought about the conditions for a Soviet participation in bilateral and multilateral treaties.

The atmosphere of the cold war spreading soon after the Second World War was again adverse to the codication of private international law. Nevertheless regulation began, basically in the relations of the socialist countries among themselves. In addition to the bilateral conventions of legal assistance and multipartite treaties in the first order treaties affecting economic life, then the creation of the General Conditions of Delivery of Goods of the Comecon Countries mostly containing provisions of direct regulation contributed too to a new type of "codification".[12] Besides the partly self-contained codes of private international law (e. g. the Czechoslovak and Polish), partly those attached to rules of substantive law (e. g. in the Soviet Union) came to life in succession.[13] In the capitalist world regulation presents two to some extent controversial

trends. The one is the doctrine corresponding to the pragmatic-empiric tendency rejecting condification.[14] This trend cropped up in a number of countries of the world with the economic, political and ideological penetration of the United States. At the same time economic needs insisted on the contrary, and sponsored by the United Nations and the European Economic Community several international conventions or regional agreements were born (so e. g. the Conditions Générales). Notwithstanding the paragmatic-empiric tendency even in the United States the Uniform Commercial Code (UCC) of 1962 was compiled, though as domestic law, still the uniform and statutory law replacing the disunity was an achievement.

b) In the socialist countries the need for a codification of private international law, or more correctly, confict law, is justified not only by the existence of a Soviet, Czechoslovak, and Polish statutory regulation. Nor is this regulation, or positions taken in literature which provide the potentialities for a codification.[15] As a matter of fact as far as Hungary is concerned, by the side of the in general emphasized need for a socialist codification the fact may have a word to say that this country has not yet come to see the first codification of private international law, although it has already been flooded by the second wave of codification.[16] In our opinion the codification of Hungarian private international will nevertheless come into being as the product of the under Hungarian conditions fairly drawn out first wave of codification streaming into the second wave.

If now the codifications of private international law already on the statute books of the countries concerned are reviewed, then it may be said that these have natured to acts of legislation only when the domestic substantive portion of conflict law as codified by private international law has already been codified. The fact that the first partial legislations (e. g. the Code civil, or the Allgemeines Bürgerliches Gesetzbuch) do not attach the conflict law to the direct regulation of substantive law as a separate part still indicates that private international law has not yet parted company with domestic law and has not gained sufficient strength. Later private international law constituting a separate part in the civil code (e. g. in the Einführungsgesetz, Codice civile, the Greek Civil Code, etc.) betrays a certain independence of private international law, the recognition of the at least formal difference of the relevant regulation (conflict law), and the awakening to consciousness of this part of the law.

In Hungary Professor Szászy's draft of before the Second World War and then his draft of 1947 for want of a codification of substantive law could not become acts of legislation. Conflict law, by way of its indirect regulation cannot go on growing unless the domestic substantive law has been stabilized, cast into the form of a statute, i. e. it has become codified law.

Naturally as far as the international aspects are concerned there are exceptions, of the two exceptions the Polish Code of Private International

Law of 1926 was prompted by the territorial disunity of the law, and so the need for a regulation of inter-territorial private law, i. e. the inter-territorial regulation of conflict law paved the way for the codification of private international law. On the other hand the Código Bustamente with its redundant casuistry brings under regulation problem of private international law in the relations of states most of which had civil codes of their own dating back to the 19th century and showing a strong Spanish influence. Even when the code is of the 20th century (e. g. in Brazil), and presents a certain approach to another (e. g. then German) law, the differences are not insurmountable to an extent obstructing the compilation of a common code.

In the course of capitalistic evolution in Hungary private law was not codified.[17] In such circumstances a comprehensive codification of private international law was out of the question. Yet even beyond this partial legislation having a role in the shaping of non-written Hungarian bourgeois private law, in judicial practice and also in jurisprudence reached the stage of the recognition of the independence of private international law only at a relatively late phase of bourgeois evolution. (I. e. in a sense that it was worth while to deal with it at all.) Owing to the undeveloped state of international economic relations and also to the close attachment of the country to Austria in Hungarian bourgeois private law of the age of the Dual Monarchy questions of private international law never looked beyond personal rights, family law and the law of succession, and sporadically to the law of international civil procedure. However, private law remained uncodified in Hungary even between the two world wars, so that no foundations could be provided for the codification of private international law. Even when autonomous codification was still wanted, the State which after the First World War regained its independence, acceded extensively to treaties subservient to the interests of the ruling classes.

After the Liberation the draft of 1947[18] was never put on the statute book, not only because of the political situation,[19] but in general owing to the economic and social conditions, and, last but not least, to the state of the legal situation. As long as the basic codification was still to be waited for, and there was no codified regulation laying down the foundations of the domestic substantive rules of a future code of private international law, the codification of the law of conflicts was out of the question. (For that matter this is confirmed also by the codification of conflict law in this sense by other socialist countries.) The private law legislation of the Soviet Union and the union republics, further certain provisions of the Foundations of Civil Procedure provide a regulation of conflict law throughout the Soviet Union. The new codes of private international law of Czechoslovakia and Poland partly follow in the wake of the relevant domestic regulation of substantive law, partly the Polish code of civil procedure itself includes comprehensive provisions of conflicts of procedural law.

The intensification of international personal and economic relations

unanimously call for a codification from the economic and social aspects of the question.[20] At the same time once domestic substantive law has been codified the potentialities will be present for a codification of private international law, i. e. conflict law. Besides the economic and social preconditions there was need for a legal basis: i. e. that there should be a well established practice in the operation of the fundamental codes (i.e. the civil code, the code of family law, labour law etc.) which at the same time brought under regulation the problems of domestic substantive law of international conflict law awaiting regulation. Although labour law has already undergone a second codification, and also family law will have to be re-codified, further the amendment and supplements to the Civil Code also insist on a re-statement, all this cannot be an obstacle in the way of the codification of private international law. As a matter of fact the codification of the conflict rules of private international law, owing to the indirect regulation of law, partly is less sensitive to a change of partial regulation, partly in the course of codification, in view of indirectness, formulation can already take into consideration the changes in economy, society and law.

2. What should a Hungarian code of private international law contain?

According to the predominant idea of the socialist theory of law codification brings under regulation the critical legal problems of a branch of law without a pretence to completeness in a way that the code incorporates the general principles and also theses characteristic of the very branch of law.[21] As far as private international law is concerned the tendencies known by the name of partialist-nationalist theories wanted to bring under regulation private international law as part of the private or civil law, so to say as part of private law as a branch of law. This doctrine found expression in the Einführungsgesetz (EG) and the Codice civile.

(*a*) There is no agreement in socialist private international law on the questions whether private international law is part and parcel of civil law, or of international law, or whether it is an autonomous branch of law, or if not, the totality of legal norms selected on certain considerations of convenience.[22] In our opinion the arguments produced by Professor Világhy in favour of the latter doctrine at the same time demonstrating the weaknesses of the former theories[23] cannot be but endorsed. In socialist circumstances the sections of substantive law, which actually in the wider sense of the term constitute the domestic "parent law" of private international law (civil, labour, family law, and in a certain sense the various procedural laws) have been brought under regulation in self-contained codes. As far as Hungarian legislation is concerned these codes in general do not contain provision of conflict law, or hardly any. Hence relations manifesting themselves as such of private international law, and calling for a regulation do not even come within the scope of a single branch of law in direct socialist regulation. Consequently the attachment

of private international law to civil law is the expression of an ill-assorted standpoint which in direct regulation recognizes the principles of classification of the socialist legal system, and even gives expression to it, whereas in indirect regulation it reverts to the so severely critized distinction of public and private law. The allocation of private international law to international law, notwithstanding the similarity of designation, is indefensible even on grounds of formal logic. The substance of the legal sources of living conditions embraced by private international law does not consist exclusively of treaties, but to a large portion of direct and in general indirect rules of domestic substantive law.[24]

For that matter the epithet "international" in the designation private international law is not quite accurate. The facts at issue which in a given instance qualify the legal relation as such of private international law, are never of an international character. As a matter of fact the international nature of the alien element in the given fact at issue is determined by the domestic law. Legal facts are by themselves colourless and inodorous phenomena, whose legal significance is given by legal regulation. What is called "international" element is non-existent, as the assumption of such an element would visualize the "international" or domestic character of the legal phenomena on the ground of a qualification by natural law, i. e. a law outside or above the domestic law of the given state. The provision of domestic law which for a definite element establishes its alien character, will as far as the given state is concerned find it such as being "alien" yet not international. Elements of this kind will turn international only when by way of a treaty in the relations among the signatory states these elements always qualify as alien, and owing to the treaty in fact become international. (The traditions of the universalist-internationalist trend are still living.)

Yet even the characteristic traits of a self-contained branch of law are absent. This is the case not merely owing to the want of the unity of subject-matter and method (in fact the method of regulation i. e. direct or indirect, is not a genuine method), but because there can be no question of an autonomous branch of law, as the scope of law here comprised irrespective of whether its regulation is direct or indirect, has but one common trait by that the civil, family and labour law relations have an alien element recognized also by the home state for which owing to a provision of either a treaty or domestic conflict law a regulation in principle departing from the otherwise normative domestic law will hold. This formal unity is too little for the creation of a branch of law, yet it may be sufficient for a scope of law owing its existence to considerations of expediency.

However, in these circumstances it may be questioned whether when the socialist legal systems use the codes for a comprehensive regulation of each branch of law there can be talk of private international law, i. e. whether a code may be compiled for private international law at all. Codification by branches of law is an unquestioned consideration for the purposes of domestic law, although even here legislation is not consistent throughout. (So e. g. a uniform regulation of the cooperatives has been

drawn out for years, and the regulation of the cooperatives by economic sectors is still being maintained.) At the same time practical needs refer to the regulation of a definable or detachable section of a branch of law (e. g. the Bulgarian act of legislation on obligations and contracts), or in particular to the statutory regulation of certain marginal scopes (so e. g. the foreign exchange code, the housing code, etc.) as codes or codifications. Hence in principle the domestic legal regulation of private international law is on the whole practicable even under socialist conditions as a supplement of the direct regulation of substantive law. However, this would for practical purposes spread this peculiar mass of legal relations burdened with alien elements if only the large codes are considered at least over three, four, or even five codes (the Civil Code, the Code of Family Law, Labour Code, or the Code of Civil Procedure, the Code of Administrative Procedure) in a way that the definition of certain uniform theses (the general part), or the creation of a certain harmony of the peculiarities manifesting themselves in the particular codes would be frustrated.

The character of a scope of law of private international law, the establishment of a harmony of identities and differences, cannot be guaranteed unless by the compilation of a separate code.

b) However, the content elements of an act of private international law come into being in a peculiar way also for other reasons. Although there are representatives of the discipline of private international law, who by the subject-matter of it understand conflict law only, even in socialist private international law there are several opinions according to which by the side of indirect regulation also material ordered by way of direct regulation belongs to private international law.[25] Here in the first place the direct regulation implied in the General Conditions of Delivery of Goods of the Comecon countries has an ordering function. Moreover in the not too distant future obviously the spread of treaties of this type is looming. Beyond this private international law recognizing conflict law only considers the part of the subject-matter implying direct regulation by treaties an integral part of either civil law, etc., or international law. Here disintegration and disunity are even more critical. Hence as for codification the question is whether only conflict law should be codified, or if direct regulation is accepted as part and parcel of private international law, this direct regulation should also be included. A further question is to what extent questions brought under regulation by a treaty may be made subject to new regulation, when this treaty has already been ratified by the state compiling the code.

The two, direct and indirect, methods of regulation manifesting themselves in private international law to a certain degree define the method of the formulation of legal rules. If the social relation implying an alien element, i. e. a social relation for the time being in a rough-and-ready way of the character of private international law, is brought under regulation by directly regulating rules, in the relations to the foreign state this regulation cannot be effective unless with the consent of the foreign state.[26] The territorial and personal effect of the legal rules is incongruous.

Consequently if the legal rule in question has to be enforced in the territory of the foreign state, a relevant provision of this foreign state will be needed. Under these circumstances the direct regulation of social relations containing an alien element, i. e. relations qualifying as such of private international law, is inconceivable unless by an agreement between the states concerned, i. e. a treaty. (Naturally in principle it is imaginable that direct regulation in the given case ignores the alien element, and settles the question accordingly. On the other hand here in the relations to the given state owing to the conscious omission of the alien element the legal relation loses its character of private international law.[27] So e. g. the provision in clause (3) §. 42 of the Introductory Act to the Hungarian Code of Family Law.)

In social relations implying an alien element recognized by the statutory regulation, still not brought under regulation by a treaty, simultaneously with the inclusion and recognition of the alien element only regulation by a rule of remission and transmission, or by way of a conflict rule will be feasible. (Here a unilateral conflict rule may be ignored.)

Owing to the duality of regulation the statuory regulation of private international law will of necessity present a dual character, and a comprensive codification such as is called for and possible at the codification of domestic substantive law, is out of the question from the very outset. Since, however, the states by way of treaties in their relations to various states agree on a regulation of different relations of private international law recognized to be burdened by alien elements, a regulation by way of treaties will become one of a dual character, direct and indirect. It is only in recent legislations that direct regulation of substantive law by treaties is making headway extensively, whereas a large portion of treaties is still made on the pattern of the earlier, indirect method, i. e. following the principle of conflict law. On the other hand domestic regulation, if it is not the enactment of a treaty, cannot apply a codification of a method other than the one in general implied in the enactment of conflict law.

In such and similar circumstances the uniform regulation of the subject-matter of private international law, when for the time being problems of volume are set aside, in a single domestic code is unfeasible for the very reason that the various treaties too contain controversial provisions in their relations to the various states. Thus the preservation of these provisions, and possibly their compilation in a single code would at most produce a codification very much on the pattern of the rather casuistic Allgemeines Landrecht, but never a comprehensive regulation of typical phenomena.

What follows logically from what has been set forth so far is that the codification of private international law (1) is in the first place of the nature of conflict law; (2) does not affect the already effective bilateral and multilateral treaties; and (3) as a codification of conflict law serves the uniform, comprehensive statutory regulation of typical phenomena not yet brought under regulation by treaties.

c) The conflict law codification of private international law is not merely supplying a deficiency, i. e. it is a necessary, yet secondary, supplementary statutory regulation. Although in point of fact there is a welcome increase in regulation by treaties as far as both states and jurisdictions are concerned, and even a certain concerted tendency may be recorded, still owing to the limitation of the parties and the legal relations brought under regulation treaties cannot bring under control the scope governed by private international law in its entirety. Still what belongs to this scope ? In recent literature one after the other owing to the alien element scopes of law of an international character turn up such as e. g. international fiscal law,[28] which set out on the path of regulation only a few decades before.

The social relations allocated to private international law manifest themselves with volumes of different considerations and of a manifold character.[29] In socialist law family law and labour law, now autonomous branches of law, and the historical parent law, i. e. civil law constitute the body of regulation. (Naturally since each state sets out from the volume of the branch of law as defined by domestic law, a classification by branches of law does not indicate a uniform volume, even when the notional volume theoretically extends to these branches of law.)

In capitalist legal systems which in this respect more or less still maintain the traditional distinction between public and private law, the part of the private law matter containing an alien element may uniformly consitute the domestic legal foundations of private international law. However, in the socialist legal system the separation by branches of law of the three scopes of substantive law, viz. civil, family and labour law, has gradually shaped the laws of motion of these branches of law of their own, their intrinsic mechanism, the specific legal regulation in certain respects departing from that of the historic parent law, i. e. civil law. In these circumstances the uniform regulation by a single code of the legal relations of the first scope of substantive law containing an alien element, in many respects departing from the traditional and possessing regularities of its own partly from the very outset confronts the codifier with greater difficulties than encountered by the makers of capitalist codes, partly sets up obstacles when it comes to harmonize international relations or to formulate the general and uniform principles. (This may perhaps account for the Soviet statutory regulation in a form attached to the Fundamental Principles.)

At the same time it stands to reason that by the side of the problems of substantive law those of the procedural laws cannot be ignored altogether. The regulation of questions of procedural law touching on civil law and taking into consideration the alien element, i. e. a regulation with a bearing on international relations, owing to the stronger ties attaching procedural law to the sovereign power, goes more into details and is in many respects on a lower level than regulation relating to substantive law. In the scope of the procedural laws the effects of the forum system of the given country prevails in a by far more decisive manner

than in substantive law. In recent socialist legislation strictly speaking there are again two solutions in procedural law. The one is the system adopted by the Hungarian Code of Civil Procedure, which within the framework of civil procedure (and certain provisions applying to extra-judicial procedure) has incorporated provisions of private international law.[30] The other method is the consolidated regulation of judicial and extra-judicial civil procedure within the framework of civil procedure yet in a manner segregated from it. This method of regulation has been adopted by the Foundations of civil procedural law in the Soviet legal system (Articles 59 to 64), and also by the Polish regulation of civil procedure (Articles 1096 to 1153 of the Code). This is also the method embodied by the Czechoslovak act of private international law and procedural law (Articles 48 to 68.) In Czechoslovak law the consolidation of provisions of substantive law and those of procedural law in a single act is, in view of the alien element implied, already an indication of the shift of the centre of gravity. At the same time the Czechoslovak act still follows the traditional concept that the provisions of procedural law apply exclusively to judicial and notarial procedure, i. e. to procedure within the judiciary.

However, in my opinion the regulation of questions of procedural law, which are closely tied up with civil, family or labour law relations containing an alien element to an extent that their segregated regulation is called for, do not stop short of the limits of the procedure subordinate to the organization of the judiciary. Essentially these limits have already been pierced by the provisions which extend to arbitral procedure settling disputes of private international law.[31] However, essentially this is but an extension of certain provisions to international arbitration without the pretence to uniform regulation. Still there is hardly a procedural regulation which would apply to a method if procedure gathering in importance in modern evolution, yet not taking place before a judicial authority. It is not exclusively in socialist evolution that we may witness the growing significance of the alien element possibly turning up on the procedural side of a problem of substantive private international law in the course of procedure before the various committees of conciliation or in general before the agencies of public administration, or in the socialist countries, before the local government councils (so e. g. in pupillary cases) to the prejudice of the ordinary courts of law or arbitration and of other judicial organs (e. g. notary public).

It is with this development in view that the Hungarian draft of 1970[32] transgresses the earlier framework of regulation when in the course of the regulation of procedural questions of an international character it does not narrow down regulation to procedure before the organs of the judiciary or arbitration.

3. System of the act of private international law.

Irrespective of whether private international law is an autonomous branch of law, or simply a scope of law, in connexion with a statutory regulation the mutual relations of the legal and doctrinal system will come into prominence. One of the first problems which had to be solved at the codification of civil law in Hungary was the establishment of the principles and systems which were then embodied by the Civil Code.[33] When now the state of preparedness of the codification of private international law is sought for in the state of codification of the underlying domestic substantive (and naturally procedural) law then e. g. the lesser or greater divergences in the statutory and doctrinal system manifesting itself in the civil code will almost infallibly have their repercussions on private international law.

The fact that in the substance of private international law an act of private international law can but be the backbone, whereas the particular members, and their forms of manifestation will be subject to both statutory regulation, and regulation by bipartite, or multipartite treaties, concerns the content rather than the system and consequently of necessity creates a difference between theory and statutory regulation. (By the side of all these we cannot ignore international custom and to a certain extent judicial practice.)

As regards the Hungarian drafts the system itself presents a close association with the theoretical notions. The system of Professor Szászy's draft of 1947, in agreement with the doctrinal notion, is split up into general and particular provisions. (It should be remembered that the five draft civil codes compiled between 1900 and 1928 omit the so-called General Part altogether.) In their intrinsic system both the general and special parts of Szászy's draft are in agreement with the system of his theoretical analyses and exposition with the additions which the need for raising the question of jurisdiction and of certain procedural problems owing to changes in the author's opinion in the meantime, has demanded.

The system of the 1968 draft is by far not so homogeneous. Although this draft following in the wake of Professor Szászy's draft among the general rules in a conspicuous form brings under regulation the problems of domestic law and nationatily, and in a separate chapter, between the provisions governing persons and ownership, the legal transactions, at the same time it devotes a separate chapter to obligations. Else in the system of this draft among and after the recognized parts of civil law provisions governing family law, jurisdiction and competence and labour law have been inserted. This system gives expression to a combination of the different opinions in the background of which, at least in this form, there is no uniform theory.

The 1970 draft in its system consistenly carries through the principles followed in the course of compilation of the Civil Code, and generalizes these for the purposes of private international law in a way to prevent considerations of the peculiarities of conflict law from getting

lost. This draft too contains general norms. However, these general norms set out from the assumption that only questions of necessity emerging owing to the system of conflict law belong to the general part. In addition to a general indication of the purpose and effect of the act these norms include the definition of the classification, remission and transmission (renvoi), the establishment of the content of foreign law, the waiving of the application of reciprocity and the application of foreign law. (I.e. a peculiar theory of legal norms springing up from the method of regulation.) So e.g. no absolutized connecting factors have been displayed or laid stress on in this draft (e.g. domestic law in Professor Szászy's draft, or in the 1968 draft), nor the question of jurisdiction, which has been brought under detailed regulation in a separate chapter.

Following upon the general part the chapters on personal rights (within it the rules governing man and State as subjects at law, juristic persons and merchants), then on property, obligations, intellectual property, succession (so far uniform with the traditional socialist civil law), further the chapters on family law, labour law, jurisdiction and competence, procedural provisions and the recognition and enforcement of foreign decisions follow. I.e. in this system the underlying concept of substantive law as taken up in the Civil Code has been completed with notions of family law, labour law, jurisdiction and procedure, and the regulation of the recognition and enforcement of foreign decisions. In its inner system only the two chapters on the law of obligations and family law are split up into three sections each. Section I of the chapter on the law of obligations contains the general provisions governing contracts, Section II applies to the particular types of contracts, Section III contains the conflict rules of damages and unjust enrichment. As for its structure this chapter departs from the Civil Code in so far as it puts the general rules applying to contracts and the conflict rules relating to the particular types of contracts in succession in the proper order, whereas in the Civil Code extra-contractual liability has been brought under regulation in a way inserted between the two sections governing contracts. The subdivision of the chapter on family law is in agreement with the traditional tripartite division of family law, viz. matrimony, kinship, guardianship and curatorship.

4. Connecting factors – general conflict law clauses – principles of codification.

In the course of the codification of private international law the question may be asked whether there are, or may at all be, principles which embrace codification as a whole, i.e. qualify as principles of codification.[34]

a) A survey of the evolution of private international law will betray that principles of codification can be discovered only in the recent phase of evolution. For the want of such principles in the earlier phases historical causes may account. Although in this respect Hungarian practice goes

to extremes, when the number of theoretical papers almost approaches that of the actual legal cases,[35] still it must be remembered that for a long time in the evolution of private international law scientific opinions had so to say a significance surpassing that of statutory legislation or judicial practice. As far as conditions in Hungary are concerned, private international law was more of a literary law ("book discipline") rather than statutory or judge-made law.

When now peculiar Hungarian backwardness is ignored, foreign experience offers a brighter picture in this respect. Still not even this picture is void of ambiguities. As a matter of fact on a broad average the statement may be made that the theoretical generalizations derived from the basically case-law nature of Anglo-Saxon law set out from the law of the forum and the mutual relation of the exceptions from this law. This is what of necessity manifests itself also in literature. On the other hand in the continental legal systems literature as well as legislation in their approach of the problems of principles of codification for a long time set out from the absolutization of, and stress on, a few connecting factors (and even here priority was given to domestic law).

The raise of the connecting factors to principles of codification[36] may essentially be explained by the circumstance that in the continental legal systems the evolution of the 19th century thrust into prominence nationality and raised it to a connecting factor of the first degree. Other connecting factors as expedients appeared only in relation to nationality. The priority given to domestic law was closely associated with the principle of exclusive jurisdiction (suits of personal status) at a time when in the territory of Anglo-Saxon law the *lex domicilii* was made the connecting factor of the law of persons.[37] The appearance of territoriality as the law of the forum on the Continent indirectly led as an expedient of jurisdiction to regulations somewhat similar to those of Anglo-Saxon law.

The latest forum approach of American law is an inevitable expansion of territoriality, the *lex fori*,[38] under circumstances where case-law still has priority. The evolution of continental law departs from this, and so also the attitude to the principles of codification, which has become manifest in the given continental legal systems.

As a matter of fact on the Continent in literature often prominence was given to the codification of private international law. Since, however, codification itself mostly takes place on definite policy-making principles, for a long time two things were understood by the principles of codification, viz. on the one part the emphasis or absolutization of a definite connecting factor or factors, and on the other, in like way with an emphasis, the solution in the one way or the other of certain general questions and of necessity concomitant of conflict law regulation (such as classification, remission and transmission (renvoi), choice of law, etc.). These positions cannot be considered such of a policy-making character in codification. As a matter of fact the codification of conflict law of

necessity implies the recourse to certain connecting factors. However, for a long time this recourse to connecting factors manifested itself in simplification and undue exploitation of a few principles rather than in the formulation of self-contained principles of codification. In point of fact certain connecting factors or certain solutions to questions of principle at the same time became principles of codification.

b) However, the presentation of connecting factors as principles of codification soon brought about that partly the possible combinations of the game of logic were exhausted, partly this reasoning in a circle inevitably triggered a trend manifesting itself as the scientific and practical introduction of new, logically conceived principles. By this way then general clauses of conflict law as developed from the connecting factors came to the fore.

Recent discussions in literature exploit "principles" of recent date in quantities. From the emphasis laid on the importance of the comparison and unification of law the demand for *Gesetzesharmonie* has developed.[39] On the Continent then the doctrines of the *spezifische Leistung* (specific performance),[40] the strongest interconnexion,[41] identical judgement by the majority of laws[42], and the duplication of the conflict rule have appeared.[43] At the dame time in response to the influence of Anglo-Saxon law the principles of neo-comity,[44] the better law,[45] self-restraint[46] and of the earlier principles the safeguard of vested rights[47] have emerged. After the "escape" into domestic law developments in private international law have reached the stage of "escape to general clauses". To all this then the principle of peaceful coexistence for a long time already emphasized by socialist jurists has acceded.

In the course of the codification of private international law this plethora of principles can be turned to good account only to the extent it is serviceable for the expression of the needs arising from the economic and social conditions of the country is question. The connecting factors are not principles of codification. With due regard to the methods of the various legal systems which may come into consideration for the regulation of conflict law, it may be said that the connecting factors which in a manner suiting the economic and social arrangements of the given state, indirectly in the interest of the development of peaceful international economic and personal relations lend themselves for decreeing the application of the law of the country which in the opinion of the legislator satisfies the interests of the ruling class best for the civil, family, or labour law relation implying an alien element. The connecting factor, owing to its normative, colourless, savourless character, by itself does not express the interest and will of the legislator. Whereas the direct rules of domestic law by the appropriate formulation of the rules of conduct purpose the achievement of ends conforming to the intentions of the legislator by the means of the law in a way that statutory regulation directly expresses these ends, this cannot be the case with the application of the connecting factors. Here the only chance offering itself at codification is to formulate

the legal norm so as to decree the application of the corresponding foreign or domestic law by indirect regulation.

However, a principle of law derived from judicial practice (case-law), or from literature by way of theory is not suitable for performing the function of the principles of codification, not even as a more indirect connecting factor. In the scopes laid out by judicial practice in private international law, and here we have in mind not only the countries of case-law, but also the continental legal systems, socialist doctrine cannot agree with a statutory regulation which e.g. by authority conferred by clause (2) §. 1 of the ZGB permits free law-making by the judge, or in private international law, the completely free creation of legal norms, e.g. by permitting the choice of the better law. For similar reasons also the principles of neo-comity or governmental interest are impracticable for this function.[48]

At the same time we cannot ignore that in the first place in the practice of the socialist countries, but even in that of certain capitalist countries, as well as in the positions taken by some of the authors on law principles are proclaimed ever more vigorously, which properly are not connecting factors, i.e. they do not define the method by which a relation may be established between the fact at issue of conflict law and the legal system to be applied, still in general permit the choice of the law to be applied by the judge from among the several legal systems which in principle may come into consideration, in conformity with the general clause. This is the sense which has to be attributed to the principles of neocomity and governmental interest. The principles of the *spezifische Leistung*, self-restraint, strongest interconnexion have about the same significance. Although on the soil of realities, still with a pragmatic character, void of a policy-making unity, these principles tend towards a case-law like solution. Similarly the principle of better law or better rule may also be the means of law-making by the judge. Essentially this principle is one of the generalized forms of those mentioned before.

The principle of an identical judgement by the majority of laws or of the duplication of the conflict rule has developed in a logical way. (What is peculiar here is that scholars like Szászy, who otherwise simultaneously with rejecting *renvoi* attributes moderate significance only to the principle of strongest inter-connexion, formulates the principles of identical judgement by the majority of laws and the duplication of the conflict rule on logical grounds.)

As theses of codification these principles could owing to the extremely wide scope allowed to judicial contingency to the prejudice of the stability of legality hardly find a place in a socialist code of private international law.[49] Still to some extent these principles may have and even have to be resorted to.

The comparison of laws, or the unification of laws, the principle of *Gesetzesharmonie* may be a target in the legislative process, still exactly owing to direct regulation the same conflict rules will not in all cases lead to the same actual provisions. Consequently in the preparatory

stage of legislation these principles may have useful and important functions to perform, still in their actual form, for the very reason of their positivist character, are not suited for the application as principles of codification.

c) Of the principles coming forward in the practice of private international law, in treaties, literature and in domestic statutory rules those may become principles of codification which may be formulated with the proper precision and delimitation even in the wording of a code of private international law.

In our opinion in this understanding a distinction ought to be made between principles which as policy-making theses direct codification work in legislation, even when not all of these turn into concrete statutes, and others, which as principles of codification appear in a normative formulation.

However, these principles cannot be legal commonplaces, as e.g. the postulates of Reese and Chatham formulated in ten points.[50] Not even in the narrower sense approved by Professor Szászy, i.e. that the judiciary has to follow the instructions of its own legislators, provided these are constitutional, or that at determining a concrete case the judge has to bear in mind the ends of his own legal rules. These principles and postulates are mostly the hazy, misleading and obscure formulations of the consideration developed by the socialist theory of state and law and formulated we may safely say with greater precision in a way normative for any application of the law or legislation.

The principles to be applied in the process of codifying socialist private international law may be considered in their formulation by Dr. Madl the proper starting-point.[51] According to Madl the policy-making and scientific considerations which define and describe codification should imply (1) that the code should extend to the whole field of *sui generis* conflict law relations; (2) that codification cannot rely on an absolutized connecting factor, or two, but has to set out from Hungarian economic and social reality; (3) that codification should take into consideration opinions and expedients manifest in international codification; and (4) that the regulation of conflict law should preferably decree the application of a single legal system to legal relations in reality constituting a unity. Of these the one under (3) should essentially be an absolutely normative consideration in the preparatory stage of codification, whereas the one under (1) expresses the completeness, i.e. the codified state of legislation. Considerations (2) and (4) on the other hand are absolutely normative for the methodological consideration of concrete formulation.

However, as a starting-point the principle of the codification of private international law as a whole stressed in all socialist legal systems should be accepted. *This principle is that of peaceful coexistence.* Essentially the socialist states and so Hungary has in the first place brought under regulation the civil, family and labour law relations in a comprehensive, quasi-code form, and has defined the law to be applied to

such relations, merely in order to advance the development of peaceful international relations. Hence the target of the act of legislation is to promote peaceful international relations and within them that of economic and personal ties. However, this statement will have an effect only if it is carried through the concrete regulation, and continues to embody the policy-making thesis.

It is the principle of codification, which has to find expression in concrete formulation in the preparatory stage of legislation, that the code of private international law should preferably cover the entire scope of conflict law relations belonging to private international law. I.e. not the *sui generis* conflict law relations, as an alien element recognized by Hungarian law may occur not only in civil, family and labour law relations which are not governed by a treaty, so that conflict law regulation will be called for. It is namely beyond doubt that regulation will have to extend to all civil, family and labour law relations containing an alien element, but not subject to a treaty. Still beyond this the conflict rules promoting substantive legal regulation to a certain extent have to contain the partly conflict law, partly direct rules which affect questions of procedural law associated with civil, family, or labour law relations incorporating an alien element. However, exactly in view of a claim to completeness not even here can we content ourselves with the regulation of judicial procedure, but in general have to set out from the need for the regulation of procedural law. Naturally where for the institution of proceedings according to Hungarian law the judiciary or any other agency of the administration of justice has competence, there the specific rules have to be stressed or preserved.

However, *sui generis* regulation does imply not only the postulate of the completeness of the conflict rules of private international law, but at the same time the shaping of a comprehensive, elastic method of regulation, which in view of the different character of the legal relations brought under regulation, regulates conflict law though with an elasticity of different degrees yet with a method implying intrinsic completeness, breakdown and gradualness.

The recourse to foreign examples receives a specific stress. The use of theses formulated by the various treaties, of the practice and literature of the socialist and non-socialist countries in private international law, further of relevant provisions of the countries having a legislation of their own in this field, has gained in significance in the first place in comparative law[52] and unification of law making headway in the 20th century, and their association with private international law.[53]

The representatives of the universalist and internationalist trend, who wanted to have the problems of conflict law regulated by treaties, and in general undervalued the domestic regulation, i.e. the codification of conflict law, owing to the potentialities offered by comparative activity in the 19th century in general refrained from giving prominence to the recourse to foreign examples, but strove for the elaboration of general principles which may be considered such of natural law. The

partialist-nationalist tendency, which in general preferred domestic statutory regulation, although it did not reject comparative law altogether, still it preferred the extension of the nationalistic character of domestic direct regulation to conflict law. Finally there was the pragmatic-empiric tendency which opposed codification of any kind, and essentially wanted foreign experience exploited by judicial practice. At the same time in modern evolution the tendencies urging codification in the first place in continental literature decidedly laid stress on the functions of comparative law, and through it on the attainment of the *Gesetzesharmonie*, and in the last resort of convergence, instead of coexistence.

The problem has its roots in the utility of foreign examples which may be resorted to for the codification of private international law, when so to say by sterilizing the one thesis or the other suggestions are forthcoming for the use of a rule considered useful. However, harmony may be studied only on the ground of a given legal system, by setting out from given economic and social conditions.

Even if the partial-nationalist theory cannot be approved, it has to be admitted that the domestic statutory regulation of conflict law (which therefore does not mean the enactment of a bilateral or a multilateral treaty) has to set out from the economic and social system of the given state, and its legal arrangements. So in Hungary only a statutory regulation of private international law (conflict law) is conceivable which is attached to the domestic substantive law, and is in agreement with domestic direct regulation.

It was one of the endeavours of bourgeois society to free the legal system of its intrinsic contradictions. Under socialist conditions owing to the unity of the basic economic and social relations and the liquidation of contradictions this endeavour is patent even more than in bourgeois society. Hence codification cannot set out but from the domestic legal system whose civil, family, or labour law relations incorporate an alien element, and consequently the question of the law to be applied has to be decided. From this point of view the legal relations of conflict law brought under statutory regulation are not of uniform significance. Basically two large groups may be distinguished. The one group consists of rules which even in domestic law are peremptory to various degrees, and therefore hardly, or not at all, recognize the free disposition of the parties. Such are ownership, regulation of the personal status, family law, labour law, the law of succession, and in general procedural law. At the same time the law governing commercial transactions, the part of contract law dealing with contracts proper, recognize permissive regulation in both domestic and international law within a wide scope and so also the control of international economic relations by way of a choice of law.

Naturally there are differences in the exploitation of international experiences according as exploitation takes place in overwhelmingly peremptory scopes, or overwhelmingly permissive scopes. In the sphere

of the law of property, the regulation of the personal status, family law, labour law and the law of succession recourse may be had to foreign experience, in the first place to agreements on judicial assistance, and to the domestic conflict rules of the socialist countries, in so far as these are in agreement with the economic and social conditions in Hungary (this is always a point of socialist statutory regulation) and there is a harmony with the direct regulation of domestic substantive law. As a matter of fact in this respect the force of legal traditions recognized as correct cannot be ignored.

The situation is an altogether different one in the field of the law of contracts. Since here regulation is in the first place of the permissive category, international experience may come into consideration at the adaptation of the permissive rules. So in all circumstances attention has to be given to the conflict rules of the Hague convention on international sales.[54] The significance of the adaptation of these rules will not be diminished even if Hungary joins the convention and enacts it. As a matter of fact owing to the adaption of the provisions of the Hague convention even in relations between the non-signatories the provisions of the convention will hold their own. The Vienna Convention of 1969 may acquire a similar character, as has been the case in Poland where a large portion of the provisions of the convention has been incorporated in the Code of Civil Procedure.

Hence a tendency to achieve a formal *Gesetzesharmonie* is not a primordial principle of socialist codification. In fact as for the content socialist codification endeavours to bring about a statutory regulation of conflict law which serves the interest of a peaceful development of international relations.

The formal principle of harmony cannot be achieved in socialist codification because in view of the alien element of private international law the *struggle against discrimination* will become even more important than formal harmony. In the rules of domestic substantive law the principles of socialist codification receive a peremptory formulation, and in private international law the formation of the public policy clause mostly of a defensive character has been known for a long time already. In the private international law of the socialist countries it has been generally accepted that the public policy clause may be invoked only for the setting aside of a concrete foreign provision applied to a given concrete legal relation, merely for reasons of defence.[55] Still even beyond this, and by the side of the already known domestic equality of rights and the most-favoured-nation-clause the fight has to be carried on against discriminative policy in a positive formulation, i.e. the potentialities will have to be provided for the substitution of positive provisions for discriminations.

Provisions of this category may turn up partly in the general rules of private international law, partly in the way certain statutory provisions have been formulated. The struggle against discrimination is closely associated with a principle manifesting itself in private internation-

al law rather in a legal formulation, viz. the principle of the *lex fori*.[56] The prominence given to the law of the forum, which in the last resort may be traced back to the principle of territoriality, is not only a peculiarty of the Anglo-Saxon legal systems,[57] as even in the continental legal systems the "trend to stay at home" is related to this principle[58]. Although the principle of the basic rule or neo-comity is foreign to socialist private international law, still in our opinion neither the other extreme can be accepted,[59] which even at its starting point avoids the provisions of domestic law, and degrades the *lex fori* to a thesis of third-rate importance.

In reality what is questioned is not whether or not the *lex fori* is a connecting factor of the first degree, i.e. it is not its weight as connecting factor which is in prominence. (Naturally in the practice of case-law, or of conflict of overwhelmingly customary law character, the *lex fori* will in all cases emerge as a question of connecting factor.) What is essential is that in the socialist countries whenever the judge or any other authority applies foreign law, this is done on the ground of the provisions of domestic law, and never as some sort of a *comitas gentium*, or basic rule, or neo-comity. Exactly owing to socialist legality the application of foreign law by the judiciary or any other authority, whenever the conditions are present, never implies the right of choice of those applying the law.

However, beyond this the presence of a hazily worded provision of law the "trend to stay at home" is a natural consequence of judicial practice. How to set up a defence against this contingency? The question is in the first place one of legislation, and only on secondary consideration one of the application of law. (The "trend to stay at home" is primarily one of application.) At the compilation of a provision of private international law before all the legistator has to set out from the need for a regulation of bilateral conflict rules. The method of regulation in principle permits the application of foreign law from the very outset. However, this potentiality on grounds of principle is not yet practice. Exactly for this reason in conformity with the socialist principle of peaceful coexistence adequate statutory guarantees have to be enacted, which prevent a conscious or instinctive "trend to stay at home", or keep it within bounds.

In this connexion two fundamental principles have to be laid down. The one is that any person in charge of the application of law will develop a trend of thought determined by the norms of the legal arrangements of a definite state. (Therefore a classification according to the *lex causae*, i.e. the modern form of natural law, would be absurd.) The classification of the legal facts cannot but set out from the domestic law of the judiciary or any other authority. The principle of the *lex fori* cannot be discarded merely because the capitalist countries have abused it within a wide scope for a long time. (In fact it was the principle of the *lex fori* that was abused, when formally for certain legal relations the application of the law of the foreign state was recognized only to disregard

it by the subsequent application of the principle of the *lex fori*. This was in fact not the use, but the abuse of a principle. Still in the retrospect this practice brings discredit on those who followed it, and therefore it would be foolish to throw out the baby with the bath water.)

What has to be set out from is the law of the proceeding authority. It is this law which establishes the presence of an alien element in the given legal relation which calls for the application of the law of two, or even more states. And yet those are right who notwithstanding the statutory regulation are afraid of the "trend to stay at home." The authority owing to its fundamentally domestic oriented cast of legal mind, in the evaluating activity implied in the process of administration of justice inevitably returns to the law of the forum. It is for this reason that statutory guarantees have to be enacted which at the well-known pitfalls marshal the activities of the proceeding court or authority to the proper direction. One of these pitfalls is the classification. A thesis should therefore be formulated, which on the assumption of the *lex fori* as starting-point declares that the fact that the foreign law in question is unacquainted with a Hungarian legal institution, or knows it with a different content or by another designation, cannot be an obstacle in the way of the application of the foreign law. Virtually this guidance eliminates the most dangerous pitfalls of the conscious or instinctive abuse of the *lex fori*.

Another pitfall in the "trend to stay at home" is hidden in the application of foreign law and the establishment of its content. Socialist legality has made it the duty of the proceeding court or other authority to be acquainted with the law, even if the parties do not refer to it (moreover the parties have to be briefed, §. 3 of the Code of Civil Procedure.) As far as foreign law is concerned the expedient which suggests itself is to oblige the court or any other authority, in addition to evidence submitted by the parties, to collect information of the unknown foreign law *ex officio* (§. 200 of the Code of Civil Procedure.) To this end all necessary assistance should be extended, by obliging the Minister of Justice to provide the required information. However, beyond this the proceeding court or authority should make use of the foreign law to be applied not only in its normative form of appearance, but setting out from the fact that the laws of the diffrent social systems basically differ from one another, further that the particular legal institutions of the states of uniform social system have been brought under regulation differently, and that the rules governing these institutions are enforced in practice in different interpretations, it has to lay down in a definite form that foreign law has to be interpreted in a manner suiting domestic practice.

An obstacle to the practical establishment of the idea of peaceful coexitence is often the want of reciprocity. Although the application of foreign substantive law has formal reciprocity as a pre-condition, and that of foreign procedural law substantive reciprocity, often the beginning of reciprocity in practice may become the cause of difficulties (e.g. in

relations to states which have recently gained their independence.) For this reason the endeavour not to make the application of foreign law conditional on reciprocity unless statute provides otherwise cannot be but greeted. A further consolidation of this principle manifests itself in the most tangible form in the rules governing intellectual property. The fundamentally territorial character of copyright, patent (industrial property) law and of the law of the protection of industrial rights has been relieved in the first place by treaties, and here reciprocity may have a significant role to play. At the same time the protection afforded by an international convention or on the ground of reciprocity will primarily extend to the property of the authors, inventors, or patentees. However, there may be cases when for the author of a work, the inventor of a not patented invention, the innovator and the beneficiary of a certificate of authorship there is no international convention or reciprocity in the relation to the given state, whereas following from the extraterritorial character of the man and personality protecting rules of socialist law the personal rights of these beneficiaries deserve protection even in the absense of a convention or reciprocity.

A decisive test of discriminative practice is the manner in which the public policy clause has been formulated and applied. It is for this reason that the socialist works on private international law in a clear-cut form emphasize the protective nature of the public policy clause ([60]). However, so to say as a guidance of practice the enactment of a statutory provision is called for which declares that foreign law cannot be ignored for the simple reason that the social system of the foreign state differs from that of Hungary. The series of examples may be continued and in particular in the sphere of problems of jurisdiction cases may turn up when the practice of the capitalist states avoids without reference to jurisdiction recourse to foreign law, when jurisdiction is considered a connecting factor.

5. Some of the methodological problems of codification.

Already in the preceding discussion questions have been asked affecting the content of codification, which at the same time have also touched on the methodology of codification and the manner of statutory formulation.

This is how the need for a *sui generis* regulation should be understood, a need which at the same time touches also on the formal side of regulation. Yet such a question is also the exploitation of international practice and foreign experience, which may be and even has to be utilized at the preparatory stage of codification. In the formulation of the particular theses and provisions *sui generis* regulation does not only imply that the totality of the scopes to be regulated should be brought under regulation with a pretence to completeness, but at the same time that for the intrinsic harmony of the code this regulation should take place according to definite principles. Essentially this may be summed up in

two theses. The one is that the law decrees[61] the application of preferably one legal system to uniform legal relations, and, secondly, that in conformity with the differences in the character of the scopes to be brought under regulation, regulation proper should take place in a variety of degrees, yet with elasticity,[62] gradually, in a multi-stage manner. However these two policy-making principles can in no circumstances become rigid categories. In fact the decreeing of a uniform law, in definite circumstances, owing to the risks implied in stereotyped abstraction, preclude the elastic method of regulation from the very outset. So regulation and the policy-making question turning up in the method of formulating the particular provision essentially demand the approach to the same problem from two sides wide apart from each other.

In domestic substantive and conflict law regulation as well as in regulation by treaties the recent socialist codification waives the once followed principle of regulation that within the framework of a single institution of law preferably all pertinent questions should be brought under regulation. The institutional civil law approach on the Continent and the concomitant condification by institutions of law has gradually undergone a change. Here we may encounter not only a horizontal regulation and within it a vertical, but from the very outset a vertical regulation preserving the unity of the given code, and even reinforcing this unity.[63] Examples for this are in a fair number e.g. in the Hungarian Civil Code when the definition of the rule of general liability at a single place (Clause (1) §. 339 of the Civil Code) is valid for the whole Code, and strictly speaking the references to this definition are also of two kinds. On the one part we have a reference to the application of this rule of liability in the presence of definite conditions (i.e. the facts-at-issue side), and on the other the inevitable exceptions are defined which call for a liability of another degree (differences on the side of the legal consequences.)

A horizontal and vertical method of regulation uniform with that of the Civil Code could owing to conflict law potentialities be hardly adopted for the codification of private international law. However, a similar method may not only, but even has to, be used.

There are two examples for a uniform law and elastic regulation, which we believe should be mentioned here. The one indicates the consistent application of a uniform law, when the draft code of private international law for registered water craft and aircraft decrees the application of the law of the state under whose flag or insignia the vehicle or aircraft takes part in traffic. This provision strictly speaking wants to guarantee the application of a uniform law not on the ground of uniform relations, but by tying the different legal relations to a single, and extremely important factor, viz. to the registration of water craft and aircaft. So far in international practice the law of the flag (according to certain opinions the law of the country of registration would be more correct, still here this is of secondary importance only) has been resorted to almost exclusively in relation to substantive law as far as such a craft was concerned. The draft too sets out from the law to be applied to the substantive legal

relations, however, it decrees the application of the law of the flag also to the sale or purchase of water craft or aircraft (for the sale or purchase of craft already registered), charter, and to the one possibility of establishing the site of the violation of law, if the violation has taken place on board the aircraft or water craft, and also to the employment of workers doing service on board *(lex loci laboris.)*

Elastic regulation may come into consideration in a variety of ways. In the literature of private international law in the 20th century the opinions emphasizing the importance of judge-made law urge an in its essence flexible regulation which even beyond the provisions of clause (2) §.1 of the ZGB permits the creation of law by the judge, in the first place by means of the general conflict law clauses already referred to. Hence in this sense elastic formulation wants to substitute flexible judge-made law for statutory law.

Socialist regulation cannot approve of this interpretation of elastic regulation. The socialist concept of legality does mean not only a solid, clear-cut legal practice relying on statutory provisions (which of course is not synonymous with exclusive peremptory regulation), but also the uniformity of legal practice. As a matter of course this uniform practice does presuppose not only a firm and clear-cut statutory regulation, but at the same time the intrinsic harmony of the statutory provisions and their freedom from contradiction, tending towards results just in the socialist acceptation of the term. Again this justice does not mean some sort of a scientific abstraction, but a formulation of the provisions embodied by the legal norms which expresses not only the interests of the masses of the working people, but in the wake of the spread of an acquaintance with the law an economic and political harmony, presupposing the concord of the single men and groups. So it is in the interest of the achievement of just ends in the socialist sense that elastic regulation in needed.

This elastic regulation does not imply the use of a uniform and identical method in all scopes brought under regulation by private international law. Basically two large scopes may be distinguished. The one is the scope of international economy, international commerce and trade, and of contracts governed by the law of obligations. The significance of this scope is yet greater because as far as contract law is concerned even the domestic law of the socialist countries in general relies on permissiveness, and this feature manifests itself even more emphatically in the regulation of international commodity relations.

The other scope comprises family law, the law of property, personal rights, the law of intellectual property, the law of succession and in general jurisdiction and procedural law. Regulation applying to these branches of law will in general contain large numbers of peremptory provisions. So in the first place there is hardly a chance left for a choice of law when persons, ownership, family relations and procedure are concerned. At the same time here too a multi-stage regulation may have to be preferred. As an example the method may serve to which recourse is had for the establishment of the law normative for the juristic person. Although this

method in general relies on the country of registration, still there are also provisions for cases when the given juristic person has been registered in several countries, or when according to the law normative at the seat of the juristic person named in the statutes there is no need for registration. In this case the law of the country of the seat named in the company statutes will be normative. If on the other hand according to the statutes the juristic person has no seat, or several seats, nor has it been registered under the law of any of the countries, the personal law of the juristic person will be that of the state where its business headquarters are.

Here it should be noted that in both theory and practice of private international law for a long time under the heading of personal law *(lex personae)* only the alternativity of *lex patriae* and *lex domicilii* was known. Yet the persons participating in international trade today are, at least in international exchange of goods crossing the state frontiers mostly juristic, and not physical persons. Therefore the correct act in private international law would be that the law normative for persons *(lex personae)* extends not only to men, as subjects at law, but also to the State as subject at law and to the juristic persons, without, however, speaking of identical personal rights. At the same time it should be remembered that in international trade the share of the merchant or businessman may be considerable. Irrespective of whether it is a one-man firm or a partnership, the *lex personae* otherwise normative for a physical person will not be applicable in all circumstances.

Hence the multi-stage method will inevitably remain applicable in these scopes otherwise hardly acquainted with the choice of law, if for no other reason, so as a guarantee of firm legality. This would be a truly elastic regulation. In scopes of law where by the side of the peremptory rules of domestic law in certain respects a freedom is allowed for contractual regulation (e. g. in labour law by a contract of employment, in the law of succession by a last will and testament, in the law of intellectual property by licence agreements) the elastic formulation of regulation should aim at (1) definig the characteristic connecting factor in the act of legislation itself, and, (2) permissiveness wherever a free choice of law is justified (e.g. for licence agreements.)

Finally, and perhaps most appropriate for the demonstration of elastic regulation, there is the scope of contracts governing international economic relations. Socialist concept recognizes the free choice of law for contracts within a narrower or wider sphere. In any case within a sphere narrower than accepted by capitalist legal systems as e.g. in family law, or for matrimonial property, the free choice of law is not recognized. In socialist opinion a choice of law may be permitted, and so the freedom of contracts recognized by domestic law extended, in transactions of commodity relations. These are mostly contracts, or licence agreements signed for the exploitation of intellectual property.

The methods of elastic regulation as far as contracts are concerned in all cases lay a stress on the choice of law (a policy correct in every re-

spect), still by itself, without any detailed contract law regulation this permissiveness would strictly speaking open a wide scope to an unscientific recourse to general conflict clauses (e.g. neo-comity, basic rule), or to wholly unfounded hypotheses.

Here the proper choice would be the recognition of the unrestricted choice of law ([64]). However, for want of this free choice of law even in socialist practice the possibility manifested itself of entrusting the *spezifische Leistung* (characteristic performance) to the judge. In our opinion between a free choice of law and the determination of a case according to the obligor of the characteristic performance there should be the statutory provision which in respect of the particular contracts itself determines what may be considered the characteristic performance under the given contract, and the element to which it attaches the law to be applied. Judicial discretion as to whether a dispute under a contract should be determined according to the law of the domicile of the obligor of the characteristic performance, or whether the law of the business seat or headquarters should be normative, may be recognized only for want of a statutory regulation as outlined above, or when the contract is atypical to a degree that the law to be applied cannot be established beyond doubt.

However, this three-stage solution in the second stage presupposes the elaboration of a detailed regulation of the most important types of contracts. If this is not done, then too frequent occasion would be offered to the third degree, i.e. judicial discretion permitted for atypical cases only. Or if the second stage is defective, or regulation not elastic enough, then a case would present itself for the application of a rigid, stereotyped foreign law in many instances alien to the essence of the given contract.

The so-called second degree, i.e. the statutory establishment of the law to be applied by types of contracts, makes use of the principle of *spezifische Leistung*. However, here it is not left to judicial discretion to decide which of the performance implied in a typical contract should be considered characteristic. If the particular types of contracts are reviewed, it will be found that basically two large groups may be distinguished. In the one group delivery of goods is implied where the economic aspect characteristic of the performance is the production of a definite result (yet not in the sense of a result as understood for contracts for work, labour and materials). On the other hand there are contracts where the subjective aspect of commodity relations is in like way of importance, still what is more characteristic is that under the contract a definite activity will have to be displayed. In these cases concepts absolutizing domestic law have also for these contracts set out from the obligor of the characteristic performance, and ignored that here in the first place the site of the performance of the activity is what counts.

The contracts of the first group include the basic sale and purchase of chattels. Here the proper action would be to accept the provisions of the Hague Convention on the Conflict of Laws as general conflict rules. However, beyond this in the formulation of the Hague Convention phe-

nomena manifest themselves which lend themselves readily for a generalization within a wider sphere. The one is the application of the law of usual residence or the seat (business headquarters). In international economic, trading and commercial relations the domestic or even residential form of the *lex personae* is not characteristic of the relation coming into being between the participants of a commercial transaction. Therefore in economic relations priority should be given to the least unit of the *lex personae*, i.e. the residence (résidence habituelle) or the seat ofbusiness (business headquarters), a policy best serving the interests of the development of peaceful international commercial relations. In international commerce the residence or business headquarters is the least common multiplier which in view of the non-specific nature of domestic law and the law of domicile in commercial relations would be acceptable for the continued development of vigorous business relations. The other factor to which recourse may be had is to establish the date at which the usual residence or the headquarters may be established. The Hague Convention fixes the receipt of the order as the date for the establishment of residence or headquarters. Therefore it by-passes the often disputed date of the conclusion of the contract, and, secondly, attaches the establishment of the law to be applied to a single, accurately definable date. The establishment of the date on this pattern will be needed also when the law of the buyer and not that of the seller, or not that of the usual residence and the business headquarters has to be applied.

For the other group of contracts the performance of a definite activity is characteristic (e.g. lease, commission, maintenance, annuity.) Inthese cases for want of a choice of law for a lease contract the law of the state has to be applied in whose territory the thing is used, for commission the law of the state where the agent performs his contractual activities, for maintenance and life-annuity the law of the where maintenance or the life-annuity has to be performed.

However, the designation of the performance characteristic according to the site of activity will establish the régime of a single law only when in conformity with the contract the activity in question has to be performed in the territory of a single state. For this reason the characteristic performance in general normative for the particular contracts and specified on a statutory level may also call for a solution by degrees. So e.g. in the case of the rather popular and widespread hire of cars under contracts permitting the use of the car in several countries the establishment of the law by the country of use or activity would introduce unwelcome contingencies. In such cases, i.e. when under the contract the thing may be used in several countries we shall have to revert to the law of persons of a definite degree of the one party. For a conctract of hire of chattels permitting use in the territory of several countries the proper course suggesting itself would for want of a choice of law be to apply the law of the state where the hirer out has his residence or business headquarters. A similar gradation appears to be desirable for contracts of agency or commission, when performance has to be made in the

territory of several states. Here too we are to revert to the one degree or the other of the law of persons. However, in this case, in view of the character of the activity the law of the residence or headquarters of the agent or commissioner should be applied, at the state on the date of receipt of the order.

The rules governing jurisdiction [65] and procedure lend themselves less readily for the formulation of elastic provisions. However, the multi-stage solution cannot be ignored even here. So e.g. continental literature and statutory regulation in general content themselves with the definition of exclusive jurisdiction, and occasionally of the precluded or competitive jurisdiction. Here in the first place the competitive jurisdiction will have to be established. What is typical, in particular in economic life, is competitive jurisdiction.

There are two exceptions from under the general rule, viz. exclusive and excluded jurisdiction. However, their statutory formulation does not present itself with uniform weight, in particular when the earlier unconditionally exclusive and unconditionally excluded jurisdictions are resolved. As a matter of fact in certain cases for a more convenient regulation of conditions of life exceptions should be allowed from exclusive jurisdiction. A case of this sort may be the peremptory statutory rule governing the procedure for the establishment of the personal status of Hungarian nationals (§. 15 of the Introductory Act to the Code of Civil Procedure.) As a matter of fact under certain circumstances the decree dissolving the matrimony of Hungarian nationals domiciled abroad has to be recognized. Although this may formally appear as an exception from under exclusive jurisdiction, for practical purposes the matter has to be settled as if it were a case of recognition of the decision of a foreign authority. On the other hand exceptions from under excluded jurisdiction are in each case formulated as rules of jurisdiction. In fact these provisions affect the jurisdiction of the Hungarian judiciary or other authorities. Hence the multi-stage solution resorted to at the formulation of the rules governing jurisdiction, or procedural rules, in view of the peculiarity of the provisions of procedural law and jurisdiction, may justify a certain, not too considerable departure from the conventional forms.

The policy-making principles of the codification of private international law here raised, and in certain respects the suggested methods of solution, do not intend to influence the concrete legal solution of the problems to be brought under regulation. At most to the extent this is necessary in order to throw a light on a concrete example. However, codification, the making of law, is a first, though long step which in the concept embodied by the codification has to be followed by a wholesome practice advancing the development of peaceful international personal and economic relations.

NOTES

[1] This paper in the first place discusses questions associated with a Hungarian codification of private international law, and touches on foreign legal regulation and literature only in so far as these are associated with questions concerning Hungarian legislation.

[2] István Szászy (1): A nemzetközi magánjog, a nemzetközi munkajog és a nemzetközi polgári eljárásjog kodifikálásának kérdése (Problem of the codification of private international law, international labour law and international civil procedure.) Á. J. X. (1967) No. 2. A summarized analysis of the problem. Further cf. Ferenc Mádl (1): Új szakasz a magyar nemzetközi magánjogban? (New phase in Hungarian private international law?) Á. J. XI. (1968) No. 2; I. Arató: Zur Kodifikationstechnik des IPR, besonders im ungarischen Entwurf von 1948. Rabels Z. 17. (1952) H. 1.; Ferenc Mádl. (2): Elméleti megfontolások gyakorlati célra nemzetközi magánjogi norma alkotásához (Theoretical considerations for practical purposes for the creation of a norm of private international law) J. K. XXIV. (1969) No. 9, further contributions to this paper; A. N. Makarov: Der allgemeine Teil des Kollisionsrechts in den neueren Kodifikationen. Ein systematischer Querschnitt. Rabels. Z. 18. (1953). H. 2 – 3.

[3] From Hungarian socialist literature cf. Miklós Világhy (1): Az új szakasz és a törvényalkotás elvi kérdései (The new phase and the policy-making questions of legislation). Proceedings of the section of social and historical sciences of the Hungarian Academy of Sciences, V. (1954); Imre Szabó (1): A kodifikáció problémái a jelenlegi tapasztalatok és feltételek tükrében (Problems of codification in the light of actual experiences and conditions). Á. J. V. (1962), No. 2; Imre Szabó (2): A kodifikáció időszerű általános kérdései (General problems of topical interest of codification) J. K. XXIV (1969) No. 10 and contributions to this paper; Jenő Szilbereky: Kormányhatározat a jogrendszer továbbfejlesztéséről (Government resolution on the continued development of the legal system). M. J. XVI. (1969) No. 9.

[4] See Szászy (1), Makarov, op. cit.

[5] Világhy (1); Szabó (1); Szabó (2).

[6] Szászy (1); in general for the sources of law see István Szászy (2): Nemzetközi magánjog (Private international law), Budapest, 1938, pp. 27 et seq.; István Szászy (3): Magyar nemzetközi magánjog. Törvénytervezet és indokolás (Hungarian private international law. Draft code and motivation). Budapest, 1948, pp. 36 et seq.; István Szászy (4): Az európai népi demokráciák nemzetközi magánjoga (Private international law in the European people's democracies) Budapest, 1962, pp. 51 et seq (Hungarian edition); István Szászy (5): Nemzetközi polgári eljárásjog (International civil procedure), Budapest, 1964, pp. 44 et seq. (Hungarian edition); István Szászy: Nemzetközi munkajog (International labour law), Budapest, 1969, pp. 37 et seq.; László Réczei (1): Nemzetközi magánjog (Private international law), 3rd ed., Budapest, 1961, pp. 40 et seq.; László Réczei: A visszautalás (Renvoi), J. K. XXV. (1970), Nos 4 – 5, pp. 151 et seq.; L. A. Lunts (1): Private international law (Hungarian edition), Budapest, 1951, pp. 21 et seq.; L. A. Lunst: Internationales Privatrecht, I – II, Berlin, 1961, 1964. Bd. I. 15 – 17, pp. 39 – 81; Miklós Világhy (2): Bevezetés a nemzetközi magánjogba (Introduction to private international law), Budapest, 1966, pp. 29 et seq.; codification is urged by Mádl (1); Ferenc Mádl (3): Külkereskedelmi monopólium. Nemzetközi magánjog (Foreign trade monopoly. Private international law), Budapest, 1966, pp. 42 et seq. (Hungarian edition); Mádl (2).

[7] Szászy (1); earlier Szászy (2), pp. 24 et seq.

[8] Mádl (1): pp. 289 et seq.

[9] L. Asztalos: Entwicklung der ungarischen Privatrechtswissenschaft im Zeitalter des Dualismus. Die Entwicklung des Zivilrechts in Mitteleuropa (1848 – 1944). Ed. by A. Csizmadia and K. Kovács, Budapest, 1970, p. 27; Mádl (4): Kodifikation des ungarischen Privat- und Handelsrechts im Zeitalter des dualismus. Die Entwicklung. pp. 108 et seq.

[10] In literature represented by E. Zitelmann: IPR. B. I. Leipzig, 1897.

[11] Szabó (1) pp. 176 et seq.; F. Mádl (5): Magyarország első polgári törvénykönyve – az 1959. évi IV. törvény – a polgári jogi kodifikáció tükrében (The first Hungarian civil code – Act IV of 1959 – in the light of civil law codification) Proceedings etc. X. (1960) Nos. 1 – 2; Mádl (4).

[12] Fragen des international Privatrechts. Acht Beiträge von Vertretern der sozialistischen Rechtswissenschaft. Ed. by H. Wiemann, Berlin 1958; Mádl (1) pp. 287; Szász

Iván: Új szakasz a KGST országok jogi együttműködésében (New phase in the legal co-operation of the Comecon-countries) M. J. XVII. (1970) No. 9; Szászy (4) pp. 57 – 60.

[13] See Szászy (1) p. 181; Szászy (4) pp. 52 et seq. Korkisch: Neues IPR in Ostmitteleuropa. Rabels Z. 32 (1968)

[14] A. Ehrenzweig: Private International Law. Leyden-New York, 1967.

[15] Mádl (1); Tervezet (1) Magyarország nemzetközi magánjogi törvényéhez (Draft (1) to the Hungarian code of private international law), Budapest, 1968.

[16] Szabó (2), pp. 494 and 498.

[17] Mádl (4); Mádl (5); László Asztalos: A magyar burzsoá magánjog rövid története (Brief history of Hungarian bourgeois private law). Polgári jogi tanulmányok (Studies in civil law) I. Budapest, 1970.

[18] Szászy (3)

[19] Világhy (2), p. 31.

[20] Szászy (1); Mádl (1); Mádl (3) pp. 12 et seq. Szász, op. cit.

[21] Szabó (1), pp. 171 et seq.

[22] Szászy (4) pp. 9 et seq.; Lunts (1) pp. 3 et seq.; Világhy (2) pp. 10 et seq.; Réczei (1) pp. 5 – 11; Mádl (1) pp. 295 et seq.; Mádl (3) pp. 33 et seq.; Ferenc Kreskay: A nemzetközi magánjog fogalma – a tervezet néhány problémája (The notion of private international law – some of the problems of the draft). J. K. XXIV. (1969) No. 9.

[23] Világhy (2) pp. 11 – 13.

[24] Only on conflict law: Réczei: Zur Frage des Gegenstandes des internationalen Privatrechts. Staat und Recht, 1955, No. 3. Kreskay: op. cit. On primarily direct rules and secondarily indirect rules: R. Wiemann: Die Bedeutung des internationalen Privatrechts in der DDR. Staat und Recht, 1954. No. 6; on both direct and indirect rules: Világhy (2) pp. 6 – 7; Mádl (1) pp. 296 – 297.

[25] See Note 24, further literature quoted in these papers.

[26] If the foreign element by way of a peremptory rule or a one-sided conflict law regulation fails to produce the wanted effect, in the event of a peremptory rule the failure will eliminate the conflict (Réczei (1) pp. 81 – 82; Világhy (2) p. 7), and for a unilateral conflict rule the foreign element.

[27] A unilateral conflict rule will in a roundabout way generally ignore the foreign law, whereas there will be a case of the conscious disregard of the foreign element, if the on principle recognized foreign element cannot even assert itself in the given relation.

[28] Tibor Nagy: A nemzetközi pénzügyi jog tárgya és helye a jogrendszerben. (Subject-matter of International Financial Law and its Place in the Legal System) J. K. XV. (1960); Weralski – Nagy – Vacsev: Problemi mezsdunarodnovo finanszovo prava. (Problems of International Financial Law) SZGP. 1967; M. Weralski: Nowa dyscyplina finansowa – miedzynarodowo prawo finansowe. (A New Discipline of Public Finance – the International Financial Law). Finanse. 1968; T. Nagy: Recent Trends in the Development of the Science of International Financial Law. Acta Iuridica Acad. Sc. Hung. T. X. (1968); H. Spiller: Aufgaben und Status des Internationalen Finanz- und Währungsrechts. Staat-Recht-Wirtschaft. Wissenschaftliche Beiträge der Martin Luther Universität. Halle. Nr. 1968/14.

[29] Szászy (4) pp. 18 et seq.; (2) pp. 3 et seq.

[30] Szászy (3) offers an exhaustive analysis of the particular rules of detail.

[31] Szászy (5) from p. 627 onwards, in particular pp. 640 et seq.

[32] Draft (1) and its historical antecedents Mádl (1) and Mádl (2). The 1970 Draft (2).

[33] Miklós Világhy: A Magyar Népköztársaság polgári törvénykönyvének rendszeréről (On the system of the Civil Code of the Hungarian People's Republic) J. K. X. (1955)

[34] Lajos Vékás: A kollíziós jog kodifikációjának elveihez (To the principles of the codification of conflict law). J. K. XXV. (1970)

[35] Mádl (2) p. 453

[36] E.g. the paper of Makarov quoted in Note 1, partly the studies of Szászy, in particular (1), and Vékás, op. cit.

[37] J. V. Long: Domicil v. Nationality. Rabels Z. 18. (1953) H. 2 – 3.

[38] Ehrenzweig, PIL.

[39] F. Kahn. Bedeutung der Rechtsvergleichung mit Bezug auf das IPR. 1900 in F. Kahn: Abhandlungen zum IPR. Bd. I – II. München – Leipzig, 1928, I. p. 494; M. Wolff:

Das IPR. Deutschlands, 3rd ed., 1954, p. 9; Neuhaus: Die Grundbegriffe des IPR. 1962. p. 38; Szászy (3); Szászy (1), pp. 185 – 186; Mádl (6): Vívódás a valósággal a nemzetközi magánjogban (Struggle with reality in private international law) Á. J. XII. (1969) No. 2, p. 83.

[40] A. F. Schnitzer: Handbuch des IPR. 3rd ed. I – II, 1950. Bd. II. pp. 643 – 644.

[41] Makarov, op. cit. pp. 216 – 217; Szászy (3) §. 12, pp. 65 – 67; Szászy (4) pp. 120 – 121; Wolff op. cit., pp. 82 – 83; Szászy (2) pp. 85 to 90; Szászy (5) pp. 176 to 183; Ehrenzweig: PIL. pp. to 68.

[42] Szászy (4) p. 122; Szászy (5) pp. 185 – 186.

[43] Szászy (4) p. 122; Szászy (5) p. 188

[44] Ehrenzweig: PIL., pp. 57 – 58.

[45] Mádl (6) p. 83; Ehrenzweig: PIL pp. 31 to 34.

[46] For the criticism of Currie's theory see Ehrenzweigt: PIL, pp. 62 to 65

[47] Makarov: op. cit. pp. 217 to 219.

[48] Mádl (6): p. 83.

[49] Mádl (6) p. 42

[50] Szászy (1) pp. 183 – 184

[51] Mádl (1) p. 294

[52] For the socialist point of view see Imre Szabó: Az összehasonlítójogtudomány. Kritikai tanulmányok a modern polgári jogelméletről. (Comparative law. Critical studies of the modern bourgeois theory of law.) Budapest, 1963; Imre Szabó: Ellentmondások a különböző társadalmi rendszerek joga között (Contradictions between the laws of the various social systems) Á. J. VI. (1963) No. 2; Gyula Eörsi: Jogösszehasonlítás és békés együttélés (Comparative law and peaceful coexistence), Á. J. VII. (1964) No. 3; Gyula Eörsi: A polgári jogi jogösszehasonlítás módszertanához (On the methodology of comparative civil law) J. K. XXI. (1966) No. 1.

[53] E. g. Gyula Eörsi: A vételi jog egységesítésének kérdéséről különös tekintettel a kollíziás normák egységesítésére (On the problem of the unification of the law of sale with special regard to the unification of the conflict rules) Á. J. VII. (1964) No. 2; Peter Katona: A nemzetközi vételi jog egységesítése. Jogi problémák a nemzetközi kereskedelemben. (Unification of the international law of sale. Legal problems of international trade), Budapest, 1959; László Réczei: A nemzetközi kereskedelem jogának egységesítéséről (On the unification of the law of international trade) J. K. XXV. (1970) No. 1.

[54] Gábor Bánrévy: A hazai kollíziós-jogi szabályozás egyes nemzetközi összefüggései (Some of the international aspects of the regulation of domestic conflict law.) J. K. XXIV. (1969) No. 9.

[55] Lunts (1) pp. 72 – 73; Réczei (1) pp. 88 et seq.; Mádl (3) pp. 249 to 257; Világhy (2) pp. 61 to 65; Szászy (4) pp. 135 to 149.

[56] Réczei (1) pp. 55 – 56; Vékás: op. cit. on the juxtaposition of Gesetzesharmonie and *lex fori*.

[57] Ehrenzweig: PIL pp. 75 et seq.; Mádl (6) pp. 72 et seq.

[58] For the first general formulation see A. Nussbaum: Deutsches IPR. 1932; cf. Ehrenzweig: PIL pp. 91 et seq., where he demonstrates that the "trend to stay at home" is of greater importance; Mádl (1) p. 306.

[59] Szászy (1) p. 186. He would drop the principle of *lex fori* in international labour law, and even in international civil procedure. Cf. Szászy (5) pp. 225 et seq. He would if possible detach the determination of the case from the law of the forum, and consider it according to the law to which the legal relation is most closely attached. (pp. 244 – 245). However, this could be done only on the ground of natural law, for in a considerable number of cases the legal relations have to be judged on the ground of domestic regulation, and not on that treaties.

[60] See Note 55.

[61] Mádl (1) p. 294

[62] Mádl (2) pp. 456 – 457, 475; László Asztalos: A rugalmasság felfogása és az egyes konkrét intézmények szabályozása a nemzetközi magánjogban (The concept of elasticity and the regulation of certain concrete institutions in private international law) J. K. XXIV. (1969) No. 9.

[63] L. Asztalos: A polgári jogi szankció. (Sanctions in Civil Law) Budapest 1966. pp. 38 et seq.

[64] §. 9 of the Czechoslovak Code of Private International Law; with limitations Article 25 of the Polish Code of Private International Law. For literature see Lunts (1) pp. 125 et seq.; Szászy (4) pp. 218 et seq.; Világhy (2) pp. 111 et seq.; Réczei (1) pp. 199 et seq.; Mádl (3) pp. 151 et seq.; István Szászy: A szerződő felek jogszabályválasztó joga a nemzetközi kötelmi jogban (Right of the choice of law by the parties in international contract law) Budapest 1929.

[65] Jurisdiction is the right of the State originating from its sovereignty to proceed in legal relations including a foreign element by public means (judiciary or another authority). Hence jurisdiction is not even in the event of exlusive jurisdiction a consequence of competence, but in all cases precedes authority and competence. Cf. paragraphs (a) and (b) Clause (1) of §. 130 of the Code of Civil Procedure..

GRUNDSÄTZLICHE FRAGEN IM ZUSAMMENHANG MIT DER KODIFIKATION DES INTERNATIONALEN PRIVATRECHTES

ZUSAMMENFASSUNG

1. Die Notwendigkeit und Möglichkeit der Kodifikation des internationalen Privatrechtes hängt in erster Reihe von wirtschaftlichen und gesellschaftlichen Bedingungen ab. Auch wenn diese bestehen, kann nur dann kodifiziert werden, wenn die Kodifizierung der inneren rechtlichen Regelung, die die Grundlage des Kollisionsrechtes bildet, bereits erfolgt ist.

2. Bei der inhaltlichen Abgrenzung eines ungarischen internationalen privatrechtlichen Gesetzes kann nur die Kodifizierung des Kollisionrechtes auftauchen, wenn auch nach Ansicht des Verfassers das internationale Privatrecht nicht nur die indirekte, sondern auch die direkte Regelung umfasst. Die Bedingungen der Kodifizierung im sozialistischen Recht, die umfassende Regelung eines Rechtszweiges, sind bei der gesetzlichen Festlegung des kollisionsrechtlichen Teils des internationalen Privatrechts nicht vorhanden. Trotzdem enthält die Kodifikation eine umfassende, auf die typischen Erscheinungen sich erstreckende Verfügung hinsichtlich der ausländische Elemente enthaltenden privatrechtlichen, familienrechtlichen und arbeitsrechtlichen Rechtsverhältnisse, sowie hinsichtlich der wichtigsten verfahrensrechtlichen Fragen – ohne die in den zwischenstaatlichen Verträgen geregelten Fragen zu berühren.

3. Im allgemeinen Teil des Systems des internationalen privatrechtlichen Gesetzes werden bloss die unvermeidlichen theoretischen Fragen der Normlehre geregelt. Dann werden die Kollisionsfragen des Personenrechts, des Sachenrechts, des Schuldrechts, des Urheberrechts und des Erbrechts, sowie nach der Regelung des Familienrechts und des Arbeitsrechts auch die internationalen Zuständigkeits- und verfahrensrechtlichen Bestimmungen geregelt.

Im Zusammenhang mit der neueren Kodifikation des internationalen Privatrechts taucht die Frage auf, ob es Kodifikationsgrundsätze gibt. Einzelne Verfasser betrachten die Anknüpfungsgrundsätze als Kodifikationsgrundsätze und neuestens verbreiteten sich in weitem Kreis die kollisionsrechtlichen generellen Klauseln.

Ein grundlegendes Prinzip der sozialistischen internationalen privatrechtlichen Kodifikation ist die friedliche Koexistenz. Die Kodifikation muss auf sui generis Art die kollisionsrechtlichen Fragen umfassen und dabei müssen nicht nur prinzipielle, sondern auch positive Regeln gegen gewisse diskriminativen Unterscheidungen geschaffen werden. Der Verfasser befasst sich auch mit der Bedeutung des Forumrechtes.

5. Im Kreis einzelner methodischen Fragen der Kodifikation erscheinen zwei scheinbar entgegengesetzte Grundsätze: Anwendung des einheitlichen Rechtes und die elastische Regelung. Die elastische Regelungsmethode ermöglicht eine mehrstufige Lösung, aber das ist abweichend auf den Gebieten mit grösstenteils zwingender, bzw. grösstenteils dispositiver Regelung.

ПРИНЦИПИАЛЬНЫЕ ВОПРОСЫ В СВЯЗИ С КОДИФИКАЦИЕЙ МЕЖДУНАРОДНОГО ЧАСТНОГО ПРАВА

РЕЗЮМЕ

1. Необходимость и возможность кодификации международного частного права зависит в первую очередь от экономических и общественных условий. Даже при существовании этих условий кодифицировать можно лишь в том случае, если уже осуществлена кодификация внутреннего правового регулирования, образующего основу коллизионного права.

2. При определении границ содержания венгерского закона о международном частном праве может возникнуть лишь кодификация коллизионного права, хотя по мнению автора международное частное право включает в себя не только косвенное, но и прямое регулирование. Условия, требующиеся для кодекса в социалистическом праве, всеохватывающее регулирование одной отрасли права, не существуют при кодификации коллизионной правовой части международного частного права. Несмотря на это кодификация – не затрагивая вопросов, отрегулированных в международных договорах – содержит всеобъемляющее распоряжение, распространяющееся на типичные явления, если смотреть с точки зрения содержащих иностранные элементы гражданско-правовых, семейно-правовых и трудово-правовых правоотношений, а также по важнейшим процессуально-правовым вопросам.

3. Система закона о международном частном праве в общей части регулирует лишь неизбежные вопросы норм права. Вслед за этим регулирует коллизионные вопросы личного, вещественного, обязательственного права, права продукции умственной деятельности и права наследования, затем после правил семейного и трудового права регулирует подведомственные и процессуальные правовые распоряжения.

4. В связи с кодификацией международного частного прада в новые времена возникает проблема того, существуют ли кодификационные принципы. Некоторые провозгласили подключающиеся принципы кодификационными принципами и в последнее время широко распространились коллизационные правовые генеральные клаузалы.

Основным принципом социалистической международной частно-правовой кодификации является мирное сосуществование. Кодификация способом sui generis должна охватить коллизионные правовые вопросы и в ходе этого необходимо создавать против определенных дискриминационных различий не только принципиальные, но и позитивные правила. Автор занимается кроме того и значением права форума.

5. Среди отдельных методических вопросов кодификации появляются два – внешне противоречивые – принципа: применение единого права и гибкость регулирования. Гибкая система регулирования дает возможность для многоступенчатого разрешения, но она различна в большей своей части обязательных, вернее, в большей своей части диспозитивных областях регулирования.